



- (2) The nature and extent of claimant's injury and/or disability.
- (3) The compensation due.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein and, in addition, the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law.

On April 17, 1990 while finishing a wall on the site of the Woodlands Race Track, claimant fell, injuring her neck, shoulder, knee, lower back and mid-back. The next morning claimant contacted her foreman and advised him that she needed to go to the emergency room. Claimant's foreman referred her to Dr. James E. Gaba who provided medical treatment through May 9, 1990. Dr. Gaba referred claimant to physical therapy where claimant was provided a TENS unit and given specific physical therapy recommendations.

Claimant was scheduled to see Dr. Gaba on May 29, 1990 but failed to appear. Thereafter, she did not return for additional authorized treatment.

Claimant continued the unsupervised use of the TENS unit through February 1991. In February 1991, claimant requested additional supplies to use with the TENS unit. At that time, claimant's request was denied by respondent. Respondent asserted claimant's claim for compensation was out of time as no written claim had been submitted for the injury of April 17, 1990. The parties acknowledge that an accident report was filed by the respondent on April 30, 1990.

K.S.A. 44-520a(a) requires a worker to serve written claim for compensation upon the employer within two hundred (200) days after the date of accident, "or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation." It is acknowledged the employer filed an accident report within 28 days after the receipt of knowledge of the accident as is required K.S.A. 44-557(a). Therefore, the appropriate time limitation in this matter is two hundred (200) days from the date of accident or the date of last payment of compensation. Claimant's claim for compensation was filed in both Kansas and Missouri on February 6, 1991, which is more than two hundred (200) days after the last time claimant saw Dr. Gaba on May 9, 1990.

Claimant contends the ongoing, unsupervised use of the TENS unit constituted ongoing medical care sufficient to satisfy the requirements of K.S.A. 44-520a. As claimant continued to use the TENS unit until May 1991, if the use of this TENS unit, though unsupervised, constituted ongoing medical treatment, then claimant's written claim for compensation on February 6, 1991 would satisfy the requirements of K.S.A. 44-520a.

In this instance claimant was scheduled for additional medical care with Dr. Gaba on May 29, 1990 and failed to appear. Claimant sought no additional medical care until February 1991. Claimant at no time sought additional treatment with either Dr. Gaba or with the physical therapy technicians to whom she had originally been referred.

In this instance express medical care was authorized by the respondent with Dr. Gaba and the physical therapist. While it is reasonable that claimant would be provided the use of a TENS unit for a period of time, it is not reasonable to assume this authorization for the use of the TENS unit extends indefinitely. This, coupled with the claimant's failure to attend the May 29, 1990 medical appointment with Dr. Gaba, indicates to the Appeals Board that claimant had abandoned the medical care authorized by respondent. As such, the unsupervised, continued use of the TENS unit by claimant would not constitute authorized medical care sufficient to satisfy the requirements of K.S.A. 44-520a.

The Appeals Board finds claimant has failed to prove by a preponderance of the credible evidence that she satisfied the requirements of K.S.A. 44-520a, in that claimant's written claim for compensation was not filed within two hundred (200) days after the date of the last payment of compensation for the injuries suffered on April 17, 1990.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Alvin E. Witwer dated December 27, 1995 should be, and is hereby, reversed and claimant is denied an award against respondent, J. E. Dunn Construction Company, and its insurance carrier, Builders' Association Self-Insurers Fund, for the injury suffered on April 17, 1990, having failed to provide timely written claim as is required by K.S.A. 44-520a. Having so found, this opinion renders all other issues in this matter moot.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier as follows:

Hostetler & Associates, Inc.	\$537.55
Metropolitan Court Reporters, Inc.	\$583.80
Owens, Brake, Cowan and Associates	\$183.20

### **IT IS SO ORDERED.**

Dated this \_\_\_\_ day of May 1996.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Dennis L. Horner, Kansas City, Kansas  
Wade A. Dorothy, Lenexa, Kansas

Alvin E. Witwer, Administrative Law Judge  
Philip S. Harness, Director